

USAWC STRATEGY RESEARCH PROJECT

A MORAL ARGUMENT ON PREVENTIVE WAR

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## ABSTRACT

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The determination of legitimate first strikes has long been a focal point of international law. While the United States continues to recognize that positive results can be achieved through a policy of deterrence, the administration concedes that deterrence can fail. Previous United States National Security Strategies (NSS) have relied on a policy of anticipatory self-defense to defend the nation. The current NSS states the purpose for the use of preemptive action is to prevent attacks from occurring without warning. This paper examines the application of anticipatory self-defense in the form of preventive war. The theory is examined under the concepts of imminent attack, just fear and sufficient threat. Preventive war challenges the jus ad bellum criteria of just cause, legitimate authority and proportionality/last resort. The review of Kenneth M. Pollack's argument in his book *The Threatening Storm* concludes that preventive war may meet the criteria of jus ad bellum. While recognizing that acts of prevention may, in some cases, be justified, the recommendation is made to adhere to the United Nations Charter and not extend the right to conduct preventive or enforcement measures beyond the authority of the Security Council.



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## A MORAL ARGUMENT ON PREVENTIVE WAR

### BACKGROUND

The current National Security Strategy (NSS) recognizes “the inherent obligation to defend our nation against its enemies as the first and fundamental commitment of the Federal Government.”<sup>1</sup> The NSS states, “We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction (WMD) against the United States and our allies and friends...to forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.”<sup>2</sup> The NSS further states, “The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reason for our actions will be clear, the force measured, and the cause just.”<sup>3</sup>

While the United States continues to recognize that positive results can be achieved through a policy of deterrence, the administration concedes that deterrence can fail. In order to dissuade the use of WMD by rogue states or terrorist clients, the NSS views a policy of preemptive strike, referred to in this paper as the Bush Doctrine, as a justifiable application of anticipatory self-defense.

Two categories of anticipatory self-defense are commonly recognized, preemption and prevention. Arthur Lykke offers a definition for each:

- **Preemptive Acts:** An attack, raid or war initiated on the basis of expectation and/or evidence that an enemy attack is imminent.
- **Preventive Acts:** An attack, raid or war initiated on the belief that armed conflict, while not imminent, is inevitable, and that delay would involve great risk.<sup>4</sup>

Applying Lykke, it would appear that the Bush Doctrine exercised a policy of prevention vice preemption during Operation Iraqi Freedom. This paper will look at the application of anticipatory self-defense in the form of prevention in actions other than humanitarian intervention. The purpose is to examine whether or not preventive war meets the established criteria of *jus ad bellum*, governing decisions to wage war.

### MORAL VALUE IN ARGUING ON PREVENTIVE WAR

We tend to speak of the rules that govern war in legal terms. But much of the argument on war is a moral one. To look carefully at the morality of war is to consider the principles of



right or wrong behavior. It is through the inspection of these moral precepts that we then develop the laws we choose to create (and sometimes enforce). This examination is an exercise in moral reasoning.

The idealist who prescribes to a pacifist view of world peace will continue to be frustrated by the reality of man's violent behavior. Both the realist and idealist are forced to recognize that man's aggression toward other men has always been (and will always be) a part of man's legacy. Therefore, the moral reasoning on war does not concern itself solely with the question of whether there should be war. The better question may be "what boundaries should we place on man's aggression?"

The determination of legitimate first strikes has long been a focal point of international law. It is because we so strongly abhor the act of aggression against others that we spend considerable time determining the justness of our actions.

### **ANALYSIS OF UNITED STATES DOCTRINE ON ANTICIPATORY SELF-DEFENSE**

Previous United States National Security Strategies have relied on a policy of anticipatory self-defense to defend the nation. George H. Bush embraced a strategy of flexible response, which demanded that we preserve options for direct defense, the threat of escalation, and the threat of retaliation.<sup>5</sup> William J. Clinton saw the need for greater efforts to stem the proliferation of weapons of mass destruction and their delivery means, but at the same time he felt we must improve our capabilities to deter and prevent the use of such weapons and protect ourselves against their efforts.<sup>6</sup> William J. Perry, Secretary of Defense during the Clinton administration, argued that developing and implementing a strategy of Preventive Defense is the most important mission of today's national security leaders and defense establishment.<sup>7</sup>

On 14 September 2001, Congress authorized the use of all necessary and appropriate force against those found to be responsible for the attacks that occurred on 11 September 2001.<sup>8</sup> This authorization was also granted in order to "prevent any further acts of international terrorism against the United States."<sup>9</sup> Congress, in effect, was arguing that the events of 9/11 had sufficiently created a legitimate just fear of future attacks. President Bush made his position on anticipatory self-defense clear during his State of the Union address of 29 January 2002.<sup>10</sup>

By September 2002 the NSS had clearly advocated a doctrine of preemption. The Bush Doctrine states, "We will disrupt and destroy terrorist organizations. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country."<sup>11</sup> In order to

justly apply a policy of preemption, the NSS states, "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."<sup>12</sup> The calling for an adaptation of the concept of imminent threat gives the Bush doctrine the appearance of condoning preventive strikes as well.

Michael Walzer concludes that aggression often begins without shots being fired or borders being crossed.<sup>13</sup> The use of force against a perceived threat will not rely on clear and present indicators of imminence but will more than likely be executed based on reliably significant indications of an aggression forthcoming.

The Bush Doctrine identifies three criteria the U. S. will consider regarding the use of preemptive strike. First, the use of preemption will be tied to the adversary's capabilities and objectives. The administration's primary concern is the threat of weapons of mass destruction, which can be delivered without warning. Secondly, the U. S. will weigh the risk of taking no action by force against that of preemption. The greater the risk the more apt we will be to strike first. Thirdly, the U. S. will consider making the first strike in matters of self-defense only, and not as an act of aggression. The last criterion is most troubling to customary and international law, for one of the easier ways in which we identify the aggressor in a conflict, is by determining who struck the first blow.

#### **FRAMING THE ARGUMENT ON PREVENTIVE WAR**

The argument goes something like this: without the existence of an imminent threat and with time to plan and execute a response other than war, a preventive war does not meet the just war criteria of a just cause, last resort or proportionality. The lack of an imminent attack clouds the issue on who is acting in self-defense and the anticipatory nature of your behavior indicates that you presume to know the consequences of your action (or inaction). In reality, the probability of the events unfolding exactly as you perceive is suspect. President Bush acknowledged this shortcoming when he commented; "Sometimes, words have consequences you don't intend them to mean... you've got to be mindful of the consequences of the words"<sup>14</sup>

Proponents of preventive war contend that one does not require a threat to be so close to execution that the only recourse is war. Anticipatory self-defense may be appropriate if it results in as much good as any other available option. This position supports the argument that, when faced with a threat (of some degree), inaction now will most likely result in intolerable consequences later. Therefore, anticipatory self-defense, if legitimate in times of imminent danger, is also legitimate in times of sufficient danger for failure to defend ones self now will

result in a considerable greater cost (in both resources and human life) to discourage the same threat later.

#### IMMINENT ATTACK

Walzer contends that “the line between legitimate and illegitimate first strikes will not be drawn at the point of imminent attack but rather at the point of sufficient threat.”<sup>15</sup> Therefore, the argument on preventive war hinges on a discussion of imminence and sufficiency. Imminence can be defined as “an impending evil or danger, ready to take place... the imminent threat may be hanging over one’s head.”<sup>16</sup> Walzer offers four criteria that may prove useful in determining an imminent threat; 1) the severity of the threat, 2) the degree of probability of the threat, 3) the imminence of the threat and 4) the cost of delay.

Imminent threat has long been the standard by which the war convention judges a response to aggression. It is ingrained in customary law’s acceptance of Daniel Webster’s position on the *Caroline Incident*,<sup>17</sup> and international law’s statement of Article 51 of the Charter of the United Nations. The belief is that in order to use force in anticipatory self-defense you must be facing a clear and present danger. If not, it follows that there is time to act in self-defense by means other than force. It is possible that acts such as sanctions or diplomacy may indeed achieve their desired affect if given time to do so.

Legitimate cases of preemption in response to an imminent threat are few. Israel’s decision to strike first against Egyptian forces during the Six Day War of 1967 is the most often cited case study. Egypt’s aggressive posturing of forces in the Sinai Peninsula along with threatening statements of intent by President Gamal Abd al-Nasser preceded Israel’s preemptive strikes. Israel contends that the Egyptians and their allies had triggered five of the six Israeli *casus belli* (reasons for war) leaving Israel to deal with an imminent threat with no other alternative than the use of their last resort.<sup>18</sup> The fact that Israel did not wait for an Egyptian attack supports the argument that a threat may come in many forms and does not necessarily include an overt act of violence. Rarely has history been so favorable toward an act of preemption.

#### JUST FEAR

It is because we may on occasion face threats that produce what Bacon termed “just fear” that we consider the justness of preventive acts. The degree to which we feel threatened influences the extent of our tolerance and consequently our action or inaction. Bacon felt that prevention seems most necessary when the threat you face creates a certain amount of fear that leads you to conclude that to take no action to prevent the aggression of you adversary

would be unacceptable.<sup>19</sup> President Bush's 2003 State of the Union address included the statement; "it would take one vial, one canister, one crate slipped into this country to bring a day of horror like none we have ever known."<sup>20</sup> Secretary of State Colin Powell's United Nations testimony of 5 February 2003 stated the significant danger that the nation and the world faced from Saddam Hussein's Iraqi regime.

Thucydides offers that the three strongest motives for dealing with a government are fear, honor, and interest.<sup>21</sup> During the Peloponnesian War, Sparta's decision to strike first against Athens was based on the fear that the existence of an Athenian empire too powerful for Sparta to defeat would shift the balance of power in the Peloponnesus.<sup>22</sup> Sparta deemed that her fear of an inevitable Athenian power justified offensive measures to defend herself. In this case, we should not concern ourselves with the argument over wars fought for the balance of power but to recognize that Sparta's fear of a perceived threat led to a preventive strike.

#### SUFFICIENT THREAT

Waiting until one faces an imminent attack means that you can defend yourself from your opponent's punch, but not before the opening bell of the fight. A sufficient threat exists well before the first bell, quite possibly before the fighters step into the ring. The act of hitting your opponent before the bell (as well as after the bell) runs counter to our sense of fair play. But in cases of self-defense, when you may have but a moments notice between sufficient indications of aggression and the execution of the act, it may be imperative to strike before your opponent is ready. It is here that we confront the gap between prevention and preemption.

Therefore, sufficient threats will challenge our fear of injury. Walzer offers three criteria for determining sufficient threat to be (1) a manifest intent to injure, (2) a degree of active preparation that makes that intent a positive danger, and (3) a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk.<sup>23</sup> Walzer does not say whether all three criteria are individually and/or collectively sufficient in order to legitimize first strikes. While not a problem for Walzer's criteria per se, a difficulty with sufficiency arises when your assurance that the criteria have been met is based on ambiguous or inaccurate indicators. Actions taken against threats of a sufficient nature are difficult to justify. As the 9/11 Commission Report found, it is hardest to mount a major effort while a problem still seems minor. Once the danger has fully materialized, evident to all, mobilizing action is easier—but it then may be too late.<sup>24</sup>

The application of sufficiency as justification to use force preventively has rarely been viewed as legitimate. Israel again offers one of the more commonly referred to case studies

with the 1981 Israeli attack on the Iraqi Osirak nuclear reactor. Israel argued that it had exercised its inherent and natural right of self-defense as “understood in general international law” and as provided for in Article 51 of the Charter, in order to halt the threat of nuclear obliteration.<sup>25</sup> However, the United Nations Security Council adopted resolution 487(1981) which strongly condemned the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct. The Security Council was concerned about the danger to international peace and security created by Israel’s premeditated act.<sup>26</sup>

## **PREVENTIVE WAR AND JUS AD BELLUM**

Strategist and historians recognize the value of offensive action as a matter of self-defense. Clausewitz felt that, “defense in general (including a course of strategic defense) is not an absolute state of waiting and repulse: it is not total, but only relative passive endurance. Consequently, it is permeated with more or less pronounced elements of the offensive.”<sup>27</sup> While Clausewitz further observed that “there can be no formulation universal enough to be called law,”<sup>28</sup> the war convention, created through the consent of states as well as treaties and customs, recognizes a legitimate use of preemptive force in self-defense. It has not extended the same legitimacy to acts of prevention.

Seven points of consideration are generally accepted as legitimate criteria for determining *jus ad bellum*: just cause, legitimate authority, public declaration, just intent, proportionality, last resort, and a reasonable hope for success. The United Nations recognizes that “long established customary international law makes it clear that States can take military action as long as the threatened attack is imminent, no other means would deflect it, and the action is proportionate.”<sup>29</sup> Preventive war challenges the criteria of just cause, legitimate authority and proportionality/last resort.

## **JUST CAUSE**

The use of force must coincide with a legitimate and morally weighty reason to go to war.<sup>30</sup> Over time the war convention has measured the moral weight of a just cause on the scale of self-defense and aggression, not good verse evil. It is as difficult to measure the degree of goodness in one’s cause as it is the evil of your aggressor. Attempts to do so lead to the application of Walzer’s *sliding scale*, the argument that implies the greater the justice of one’s cause the more rules one can violate for the sake of the cause.<sup>31</sup> Therefore, the type of evil that one faces does not by itself justify the use of anticipatory self-defense.

Anticipatory self-defense is gaining legitimacy against aggressive non-state actors. The fact that rogue states and terrorist clients may be involved in conflict does not invalidate theories

of aggression, for these actors threaten the rights of territorial integrity and political sovereignty the same as nation-states.<sup>32</sup>

Article 51 of The Charter of the United Nations is explicit in recognizing that “nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>33</sup> The UN has recognized customary law’s interpretation to include threats of an imminent nature. Reserving the use of force to imminent threats is an attempt to limit the number of world conflicts. To date, there is no data that supports (or disputes) a correlation between the two. What the article does restrict is the inherent right of individual and collective self-defense in cases of prevention. This right is reserved for the Security Council only in Article 50 of the Charter. Both the idealist and realist fear that if preventive war gains legitimacy in international law, states may be tempted to abuse such an option. The precedent set by the current NSS has allowed other states to make similar claims of self-defense.

The concept of legitimate first strike has significant bearing on the theory of *jus ad bellum*. Striking first takes on the appearance of aggression and is rarely interpreted by the war convention as just. Though anticipatory self-defense is often viewed to be on the moral fringes of the just war continuum, its proponents argue that the act is legitimate. Advocates of preventive war hold the position that it is possible to acquire a legitimate degree of just fear from a sufficient threat as well as an imminent one.

Another argument against preventive war is that it relaxes the principle of last resort. In response to the *Caroline Incident*, Secretary of State Daniel Webster expressed the more commonly accepted criterion of necessity in his 1842 letter to British Lord Ashburton. In that letter Webster stated that a belligerent would have to demonstrate that the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”<sup>34</sup> Opponents to preventive war argue the concept relies little on the Webster criteria.

#### LEGITIMATE AUTHORITY

The use of force is authorized by an agent who has the legitimate authority to do so. Legitimate authority restricts the number of agents who may authorize the use of force.<sup>35</sup> Customary law and international agreements have established agents of legitimate authority. We also recognize the authority of those who hold the sovereign power of the state as

legitimate. Only in those cases where the authority's ability (or desire) to represent the people it serves is deemed to be suspect do we then question the sovereign's legitimacy.

While prevention is clearly recognized by the international community to have legitimacy, Article 50 of the Charter to the United Nations establishes the Security Council as the only legitimate authority to conduct preventive or enforcement measures against any state.<sup>36</sup> Rarely has the Council invoked this article and seems reluctant to do so.

Additionally, the UN High-level Panel on Threat, Challenges and Change holds to the position that Article 51 "should be neither rewritten nor reinterpreted, either to extend its long-established scope (so as to allow preventive measures to non-imminent threats) or to restrict it (so as to allow its application only in actual attacks)."<sup>37</sup> The panel feels that states are provided with ample measures for notifying the Security Council on matters of self-defense, and should exercise those means on a more frequent basis. In doing so, the Security Council is afforded a greater opportunity for bringing the conflict to a peaceful resolution. However, there is no empirical data to show how successful the Security Council has been in preventing acts of aggression.

#### PROPORTIONALITY AND LAST RESORT

Proportionality is often seen as a requirement that measures the likely harms from war to the gains to be achieved. The fact that one has a just cause may not be in proportion to the damage and injury that would result from the use of force necessary to achieve this cause. The intent to use force must be clearly stated and coincide with the Just Cause criteria, meaning the intent will be to use force in such a manner as to limit the amount of injury in order to achieve a just resolution to the dispute.

Requiring that war be the *ultima ratio*, the last resort, restricts the use of force to those instances that are deemed absolutely necessary. It is argued that preventive war demonstrates the absence of patience. It is as if the defender has become intolerant to the threat and is increasingly impatient in waiting for signs of imminence. Achieving the criterion of last resort means doing everything possible that seems to a reasonable person promising.<sup>38</sup> It does not imply that you have exhausted all other avenues of recourse, for in reality, one can never be sure if there is not something else, something if perhaps applied again, would resolve the conflict. To argue that one has not arrived at the last resort simply because the use of force or violence against you has yet to occur, argues that you must wait to be shot at before you can fire. This argument would limit your ability to defend yourself against return fire only.

## **POLLACK'S POSITION ON PREVENTIVE WAR AND IRAQ**

A case study appropriate to the discussion of preventive war comes from Kenneth M. Pollack's 2002 book *The Threatening Storm*. Pollack argued in favor of the United States taking preventive action against a threatening Iraq, described along six points: 1) the continued development of Iraq's WMD, 2) the rebuilding of Iraq's terrorism capabilities and the development of contingency plans of terror against the United States, 3) Saddam's intent to be the leader of the Arab nation, 4) Saddam's intent to establish Iraqi hegemony in the Persian Gulf, 5) Saddam's intent to enact vengeance on the United States for the 1991 Gulf War, and 6) the eventual and inevitable use of WMD by Saddam, particularly if he feels his regime is in danger.<sup>39</sup>

Pollack identified five options for the United States (and the international community) to consider when dealing with the emerging threat of Saddam Hussein's non-compliance to U.N. resolutions. The options were deterrence, containment, covert action, support for an incursion of trained forces (referred to as the Afghan Approach), and invasion. Maintaining the status quo (doing nothing differently) was not considered a viable approach, though it always remained an option.<sup>40</sup>

## **JUST CAUSE**

Pollack's argument is consistent with the "sufficient threat" criterion for prevention. The terrorist attacks of 9/11 were a "wake-up call" to how vulnerable America had become to acts of aggression.<sup>41</sup> This is another way of saying that 9/11 had created a just fear in the American leadership to warrant preventive measures. While the resulting NSS and Bush Doctrine of preemption reflected this assessment, neither of Pollack's points supported a claim of sufficient threat from Iraq specifically. It does, however, speak directly to the rise of American paranoia of an impending "second strike".

Though no evidence had been found linking Iraq to 9/11, the biggest threat to America came from a Saddam Hussein regime that would inevitably possess, and have the will to use, nuclear weapons.<sup>42</sup> The fact that Iraq had used chemical weapons in previous conflicts and had made overtures to obtain nuclear weapons led to the international intelligence communities collectively belief that Saddam had an active WMD development program.

Preventive war presumes that the threat is dangerous enough to warrant action. It does not rely on clear and present signs but rather sufficient unambiguous indicators. In 2005 the Iran Survey Group reported Iraq did not have a stockpile of WMD and had not started a program to produce them.<sup>43</sup> While this finding stresses the importance of obtaining an accurate



assessment of the threat, it does not weaken Pollack's argument that Saddam would inevitably obtain WMD.

#### LEGITIMATE AUTHORITY

Pollack argued that the right of anticipatory self-defense exists at the nation-state level when international governing bodies are unwilling or incapable of taking such measures. Pollack further asserted that if the United States did not back up their (and the United Nation's) "threats" to take action against an Iraq in violation of UN resolutions, both the international community and Iraq would deem the resolutions to be meaningless.<sup>44</sup> President Bush's speech to the UN stressed that if the international organization would not enforce sanctions, the United States would do so as an act of self-defense.

Such action is in conflict with Article 50 of the United Nations Charter and the Security Council's close hold on the legitimate use of preventive measures. Pollack felt that the UN resolutions were being undermined by member states and would not eliminate the development of an Iraqi WMD program. Pollack argues that the United Nations, having no resolve to enforce the previous resolutions, had abdicated its legitimate use of prevention to the nation-state. Therefore, Pollack deemed the application of the Bush Doctrine as appropriate. It should be noted that Pollack's book was published prior to the issuance of UN Security Council (UNSC) Resolution 1441 which found Iraq in material breach of disarmament and stressed that Iraq would face serious consequences if the resolution was not adhered to. UNSC 1441 had offered Iraq the "final opportunity to comply".<sup>45</sup> To Pollack, such a resolution would be viewed as business as usual resulting in the same affect as previous actions.

#### PROPORTIONALITY AND LAST RESORT

Pollack had three points regarding last resort. First, all other options to prevent Iraq from obtaining nuclear weapons had failed or were failing. It was neither required nor desired to continue the enforcement of failed sanctions. Secondly, the costs of not attacking but rather waiting until Saddam posed a more imminent threat were too costly in terms of resources and casualties. Thirdly, with the eventual attack from a nuclear armed Saddam a forgone conclusion, the wake of 9/11 had raised public support for a military response to its highest level than in recent years. Further, the acceptance by the international community of America's right to self-defense suggested that it was best to act now rather than later.<sup>46</sup>

Pollack felt that the sufficient nature of the threat justified a first strike. The intent of preventive action is to defeat a threat before it becomes imminent and so dangerous that it would result in an unacceptable level of harm to the sovereign territory. Preventive acts are not

planned and carried out against ambiguous and presumed threats. Those exercising self-defense with preventive action must be convinced that they face an aggressor who has more than a presumed intent to strike. Though the threat may not be imminent, clear and present, it must be sufficiently serious enough, unambiguous and forthcoming.<sup>47</sup>

Pollack's argument in favor of invasion can be viewed in terms of *jus ad bellum*. Pollack determined America's cause to be in response to a just fear, the right to respond legitimate, and the application of force proportional and appropriate. Pollack's threat arguably meets three of Walzer's four criteria for determining an imminent threat, failing only to clearly meet the criteria of imminence. However, Pollack's analysis of Iraq supports Walzer's criteria for determining a sufficient threat, making a legitimate case for a preventive strike.

The legitimacy of the Bush Administration's application of first strike against Iraq in 2003 continues to be evaluated against the two standard bearers of last resort and imminent threat with little regard to a definition of sufficient threat. The Bush Doctrine is seen as arguing that "the greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains to the time and place of the enemy's attack."<sup>48</sup>

Based on a belief that Saddam Hussein had a manifest intent to injure the United States, the Administration contends its actions were just on the grounds that inaction would have been more damaging to the nation's self-defense. However, the threat posed to the United States by Saddam Hussein has been viewed as not meeting any of the criteria outlined in the Webster letter. The strongest challenge to the Administration's defense of conducting a preventive war remains in its inability to uncover proof that this manifest intent or Iraq's actual possession of WMD existed. Herein lays the danger of conducting preventive strikes based on intent rather than outward displays of aggression.

## **RECOMMENDATIONS ON A DOCTRINE OF PREVENTIVE WAR**

The restrictive nature of customary and international law requires us to closely examine our intent to use force. The inherent right of self-defense outlined in Article 51 of the UN Charter is explicit in language to restrict the use of force to attacks that have occurred. The report from the High Level Panel of the UN recognized that long standing customary international law makes it clear that States can take military action as long as the threatened attack is imminent, no other means would deflect it, and the action is proportionate.<sup>49</sup> Consequently the Panel recommends that Article 51 remains as is and that we not look for

alternatives to the Security Council authority but to make the council work better than it has.<sup>50</sup> This paper concurs with the panel's conclusion.

If Jus ad bellum for preventive war does exist, it's justification lies somewhere along a continuum between sufficient threat and just short of imminent attack. Such a distinction is too ambiguous in nature and leads to the application of force in times when the intent of an aggressive actor and/or the inevitability of attack are in question. Nations and actors should be allowed to rattle their sabers and quarrel as a form of diplomacy. Nations must be allowed to continue in such legitimate activities as the arming of soldiers without facing an armed response. The acceptance of preventive war as a legitimate application of self-defense starts the nation-state opens the door to the irresponsible use of force to solve disagreements. Therefore, the legitimate authority to conduct preventive or enforcement measures as stated in Article 50, should remain the prevue of the Security Council.

While the spirit of the Bush Doctrine is in congruence with the United Nation's interpretation of legitimate anticipatory first strike as a response to acts of aggression, the doctrine should not be extended to include acts of a preventive nature. Rightly applied, the NSS is a clear signal to terrorists and rogue actors that the United States will not tolerate threats of an imminent nature. The NSS recognizes the legitimate use of anticipatory self-defense against threats that cannot or will not be deterred, have an inherent sense of immediacy in their delivery, and possess a magnitude of potential harm that makes allowing for their use unacceptable. It is the most appropriate policy for meeting the foremost obligation of the Federal Government.

## **CONCLUSION.**

While preventive war is not unjust, it is extremely difficult to justify. The National Security Strategy clearly states the manner in which we will determine those threats that require preemptive or preventive strike. When making the argument on anticipatory self-defense it is important to consider the criteria of both sufficient and imminent threat, for this has long been a standard by which the war convention has judged the legitimacy of a first strike. International law recognizes that preemptive strikes, as a matter of self-defense, can be performed against threats somewhat short of imminent, yet significant enough to cause just fear. The principles of proportionality and last resort must also be applied if prevention is to be viewed as just. Failure to consider all reasonable options, to include the use of force, weakens the moral position of the user and implies that violence is the preferred method of conflict resolution.

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## ENDNOTES

<sup>1</sup> George W. Bush, *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, 2002), i.

<sup>2</sup> Ibid. p. 14-15.

<sup>3</sup> Ibid. p. 16.

<sup>4</sup> Arthur F. Lykke, ed., *Military Strategy: Theory and Application* (Carlisle Barracks, PA: U.S. Army War College, 1993), 386.

<sup>5</sup> George H. Bush, *National Security Strategy of the United States: 1990-1991* (Washington, D. C.; The White House, 1990) 87.

<sup>6</sup> William J. Clinton, *A National Security Strategy: 1995-1996* (Washington, D.C.: The White House, 1995), 35.

<sup>7</sup> Ashton B. Carter and William J Perry, *Preventive Defense: A New Security Strategy for America* (Brookings Institution Press, Washington D.C. 1999), 14. The term Preventive Defense was one developed by Ashton and Perry. The term was not incorporated into any of the Clinton National Security Strategies.

<sup>8</sup> Congress, Senate and House of Representatives, *Public Law 107-40 Joint Resolution of the Senate and House of Representatives Authorizing the Use of force Against Terrorism* . 107<sup>th</sup> Cong., 18 September 2002; available from <<http://lapaz.usembassy.gov/sep112004/ley107-40.pdf>>; Internet; accessed 02 March 2005.

<sup>9</sup> Ibid.

<sup>10</sup> George W. Bush, *State of the Union Address*, 29 January 2002: available from <<http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> >; Internet; accessed 02 March 2005.

<sup>11</sup> George W. Bush, *National Security Strategy of the United States*, 6.

<sup>12</sup> Ibid. p. 15.

<sup>13</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 3<sup>rd</sup> Ed. (New York: Basic Books, 2000) 74.

<sup>14</sup> "Sometimes, words have consequences," *CNN*, 16 January 2005 ; available from <http://www.cnn.com/2005/ALLPOLITICS/01/14/bush.regrets.ap/index.html>. Internet accessed 16 January 2005.

<sup>15</sup> Ibid, 81.

<sup>16</sup> *Merriam-Webster's Collegiate Dictionary*, 11<sup>th</sup> Edition. (Merriam Webster, Incorporated: Springfield, MA) 2003.

<sup>17</sup> The *Caroline incident* occurred on 29 December 1837 when the British, fearing that the U.S. owned ship *Caroline* was being used by Canadian rebels, boarded the ship, killed several U.S. nationals and sent the ship over the Niagara Falls. The action was seen as one of preemption by the British, but of aggression by the United States.

<sup>18</sup> Daniel L. Zajac, *The Best Defense is a Good Offense: Preemptions, Ramifications for the Department of Defense*. Strategy Research Project (Carlisle Barracks: Army War College, 22 May 2003) 12. Egypt's aggressive posturing of forces in the Sinai Peninsula along with threatening statements of intent by President Gamal Abd al-Nasser preceded Israel's 1967 preemptive strikes. The six *casus belli* were 1) a massive build up of threatening forces near Israel's borders, 2) the closing of the Strait of Tiran, 3) a high level of guerilla attacks that could not be contained by passive defense or punitive raids, 4) preparation for a strategic attack on Israeli population centers, infrastructure, or facilities, 5) the entry of Jordan into alliance with Egypt and Syria; the take over of Lebanon of Jordan by hostile powers and 6) a growing imbalance in the combat potential between probable aggressors and Israel. Zajac does not indicate at what point in time Israel had adopted these six criteria.

<sup>19</sup> Francis Bacon, *Essay: On Empire* (London, Penguin Books, 1984).

<sup>20</sup> George W. Bush, *State of the Union*, 29 January 2003; available from <<http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>>; Internet; accessed 02 March 2005.

<sup>21</sup> Robert B. Strassler, *The Landmark Thucydides: A Comprehensive Guide to the Peloponnesian War* (New York: Simon & Schuster, 1998), 43.

<sup>22</sup> Donald Kagan, *On Origins of War* (New York; Anchor Books, 1996) 51-66.

<sup>23</sup> Walzer. pg. 81.

<sup>24</sup> National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, (W.W. Norton: New York, London) 350.

<sup>25</sup> United Nations, Repertory of Practice of United Nations Organs, Supplement No 6. (1979-1984), Volume III Article 51. Pg 13; available from <[untreaty.un.org/cod/repertory/art51/english/rep\\_supp6\\_vol3-art51\\_e\\_advance.pdf](http://untreaty.un.org/cod/repertory/art51/english/rep_supp6_vol3-art51_e_advance.pdf)> Internet; accessed 25 February 2005.

<sup>26</sup> Ibid.

<sup>27</sup> Carl von Clausewitz, *On War*. Translated and edited by Michael Howard and Peter Paret. (Princeton: Princeton University Press, 1984) 542.

<sup>28</sup> Ibid, 152.

<sup>29</sup> United Nations, *Report of the High-level Panel on Threats, Challenges and Change: Executive Summary* (United Nations Foundation, 2004) 4; available from <<http://www.un.org/secureworld/brochure.pdf>> Internet; accessed 25 February 2005.

<sup>30</sup> J. Boone Bartholomees, Jr., ed., *Guide to National Security Policy and Strategy* (Carlisle Barracks: U. S. Army War College, July 2002) 23.

<sup>31</sup> Walzer, 229.

<sup>32</sup> Walzer, 61-63. His theory of aggression holds six positions: 1) that there exists an international society of independent states, 2) this international society has a law that establishes the rights of its members—above all, the rights of territorial integrity and political sovereignty, 3) any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act, 4) aggression justifies two kinds of violent response: a war of self-defense by the victim and a war of law enforcement by the victim and any other member of international society, 5) Nothing but aggression can justify war, 6) Once the aggressor state has been militarily repulsed, it can also be punished.

<sup>33</sup> United Nations, *Charter of the United Nations*. available from <<http://www.un.org/aboutun/charter/>>. Internet; accessed 04 October 2004.

<sup>34</sup> Anthony Clark Arend, "International Law and the Use of Preemptive Use of Military force," *The Washington Quarterly*, Vol. 26, No. 2, (Spring 2003).

<sup>35</sup> Bartholomees, 24.

<sup>36</sup> United Nations, *Charter of the United Nations*. Chapter 7, Article 50. Available from <<http://www.un.org/aboutun/charter/chapter7.htm>> Internet. Accessed 04 October 2004.

<sup>37</sup> United Nations, *Report of the High-level Panel on Threats, Challenges and Change*, (United Nations Foundation: 2004) 106; available from <<http://www.un.org/secureworld/report2.pdf>> Internet; accessed 25 February 2005.

<sup>38</sup> Bartholomees, 24.

<sup>39</sup> Kenneth M. Pollack, *The Threatening Storm* (New York: Random House: 2002). 148-180.

<sup>40</sup> Ibid, xxix-xxx.

<sup>41</sup> Ibid, xxii.

<sup>42</sup> Ibid, xxi.

<sup>43</sup> "U.S. Ends Search for WMD in Iraq," *CNN*, 12 January 2005; available from <<http://www.cnn.com/2005/US/01/12/wmd.search/index.htm>> Internet accessed 12 January 2005.

<sup>44</sup> Pollack, xxiv.

<sup>45</sup> United Nations, *Press Release SC/7564*, 08 August 2002; available from <<http://www.un.org/News/Press/docs/2002/SC7564.doc.htm>> Internet accessed 14 March 2005.

<sup>46</sup> Ibid, xxiii.

<sup>47</sup> Walzer. pg. 80-81. He concluded that certain actions are not significant enough to warrant preemptive action. These acts include boastful rantings, military preps of classic arms race, hostile acts short of war (to include violence or "quarrels within limits") and provocations.

<sup>48</sup> Ibid.

<sup>49</sup> United Nations, *Report of the High-level Panel on Threats, Challenges and Change*, Executive Summary, 4.

<sup>50</sup> United Nations, *Report of the High-level Panel on Threats, Challenges and Change*, 106.

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